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CITATIONS

693514—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1112

C. R. MOFFITT, ALIAS CARVEL R. MOFFITT,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 495–502) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 15, 1946 (R. 502–503). The petition for a writ of certiorari was filed April 15, 1946. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.[1]

QUESTIONS PRESENTED

1. Whether proof that a letter was received through the United States post office is sufficient to prove use of the mails.

2. Whether the judge properly instructed the jury on the issue of intent.

3. Whether a charge that the presumption of innocence was not designed to enable one who was in fact guilty to escape just punishment constitutes reversible error.

STATUTE INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * *

[1] The petition was filed within 30 days, exclusive of Sundays and holidays, from the date of the judgment of the Circuit Court of Appeals, as allowed by Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934, but more than 30 calendar days after the judgment, as allowed by Rules 37 (b) (2) and 45 (a) of the new Rules of Criminal Procedure, effective March 21, 1946. Since the petition seeks review of a judgment entered prior to the effective date of the new rules, we do not contest its timeliness. See Rule 59 of the Rules of Criminal Procedure, providing that, "so far as just and practicable," the rules govern all criminal proceedings which were pending on their effective date.

> shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

An indictment in three counts was returned against petitioner in the United States District Court for the Western District of Oklahoma, charging use of the mails in furtherance of a scheme to defraud the Mudge Oil Company by purporting to sell it worthless oil leases (R. 1–8). Petitioner was convicted on all three counts (R. 11), and was sentenced to imprisonment for five years on each count, the sentences to run

consecutively (R. 12–13). On appeal, the judgment was reversed as to the third count and affirmed as to the first two (R. 502–503).

The evidence for the Government may be summarized as follows:

In the Spring of 1942, petitioner acquired from one Charles Day a block of five-year oil and gas leases which were held in escrow by the Security Bank of Blackwell, Oklahoma, until commencement of the digging of a well (R. 78–80, 302; Gov. Exs. 21–25, R. 110, 375–386; Def. Exs. F., R. 79–80, 433–436, K, R. 87, 441–442, and 52–57, R. 183–184, 457–465). In July of 1942, petitioner endeavored to have the bank turn the leases over to him but the bank refused to do so on the ground that he had merely set surface pipe and had not commenced the digging of the well (R. 82, 90–91). No further work was performed, but in September 1943, after the escrow agreement had expired, petitioner obtained a number of these leases by agreement with the land owners (R. 85–88, 270–273; Def. Exs. J. and K, R. 87, 440–443). Wells drilled in the general location of these plots showed the area to be unfavorable as a source of gas and oil (R. 126, 143–145). As of March 1944, the value of leases in the area was about $1 per acre (R. 137, 144). Petitioner admitted on the stand that he could at any time have obtained the leases by paying $1 per acre to the land owners (R. 302).

In March of 1944, petitioner purported to sell leases on 640 acres to the Mudge Oil Company for $25,000 (R. 277; Def. Ex. Q, R. 174, 453). Petitioner's version of the transaction, as given in a statement to agents of the Federal Bureau of Investigation and in his testimony on the stand, was that one Ralph Howard, who represented himself as a member of the land department of the Mudge Oil Company, called on him on Saturday, March 4, 1944, and expressed interest in the leases. Howard told petitioner that he was authorized to spend $25,000, but that he thought that $10,000 was a good price for petitioner's acreage; that he would therefore pay $25,000 for 640 acres, but that he expected $15,000 back. That evening, Howard told petitioner that the deal had been approved. About noon on Monday, March 6, Howard gave petitioner a $25,000 check of the Mudge Oil Company drawn on the Mellon bank in Pittsburgh. No abstracts of title were furnished and no leases were delivered or assigned at the time. Immediately thereafter, Howard left town. Petitioner deposited the check for collection in his bank in Blackwell. About two weeks later, the bank gave him its cashier's check for $25,000, which he had cashed by his attorney in Oklahoma City. After receiving the money, petitioner met Howard in Oklahoma City and gave him $15,000 in cash. He never saw Howard again. (R. 28–32, 276–282, 291–293.)

The check purporting to be that of the Mudge Oil Company was a forgery (R. 58, 70, 77).

The first count of the indictment was based on the mailing of the $25,000 check by the Blackwell bank to its correspondent bank, the Guaranty Trust Company of New York, for collection (R. 2–5, 48–49; Gov. Exs. 4 and 5, R. 49, 329, 331).[2] The second count was based on the mailing of a "paid advice" from the Guaranty Trust Company of New York to the Blackwell bank, informing the latter that the check had been paid (R. 5–6, 50; Gov. Ex. 8, R. 51, 337).

ARGUMENT

1. The cashier of the Blackwell bank testified that the "paid advice" which formed the basis of the second count had been received by mail through the United States post office addressed to the bank (R. 50). Petitioner argues (Pet. 6, 14–15, 16, 18–20) that proof of receipt of this document through the post office was insufficient to establish that the mails were used. Obviously, however, if the letter was received from the post office the mails were used in the transmission thereof. The cases which petitioner cites (Pet. 19–20) deal with situations where proof of use of the mails was based on custom, not on direct

[2] Petitioner admitted on the stand that he did not expect to receive the money for the check immediately upon deposit (R. 279). The cashier of the bank testified that he told petitioner that the money would not be paid until the check had been cleared (R. 48).

testimony of receipt, or where receipt of a letter was held insufficient to prove that a particular person had mailed it. In this case, the Government did not contend and was not required to prove that petitioner had himself mailed the letter which formed the basis of the second count. His liability was predicated on the fact that he had caused the use of the mails by depositing the check for collection knowing that the mails would be used to transmit it and to report payment thereon. Petitioner does not deny that the use of the mails to report payment was a reasonably foreseeable consequence of his act in depositing the check for collection, and that he therefore may properly be held to have caused the mailing. *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Kenofskey,* 243 U. S. 440, 443; *United States* v. *Weisman,* 83 F. 2d 470, 474 (C. C. A. 2), certiorari denied, 299 U. S. 560; *Shea* v. *United States,* 251 Fed. 440, 447 (C. C. A. 6), certiorari denied, 248 U. S. 581; *Spear* v. *United States,* 246 Fed. 250, 251 (C. C. A. 8), certiorari denied, 246 U. S. 667; *United States* v. *Decker,* 51 F. Supp. 15, 18 (D. Md.), affirmed, 140 F. 2d 378 (C. C. A. 4), certiorari denied, 321 U. S. 792.

2. The judge instructed the jury that one element of the offense of mail fraud was the formation of a scheme with intent to defraud. He then stated (R. 315–316):

> You are further instructed that the question of intent is one that is hard to

establish directly, because grown persons do not always disclose the object they have in view in any acts in which they may indulge, and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it. But in connection with all this, unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural and probable and reasonable consequences of his act.

As to the alleged scheme or artifice of the defendant with George Harris, alias Ralph Howard, to defraud the *Modge* Oil and Gas Company, the burden is upon the United States to prove such scheme and artifice as alleged in the indictment. The defendant is presumed to be innocent of forming and going into such scheme and artifice, and the burden is upon the United States to prove, by competent evidence beyond a reasonable doubt, that he formed and entered into such scheme and artifice with intent upon his part to defraud said oil company, and if, upon consideration of all of the evidence and testimony which the Court has permitted you to receive and consider, you entertain a reasonable doubt as to whether the defendant formed and entered into such scheme and artifice with intent upon his part to defraud said oil company, then you should acquit him.

> On the other hand, if you find from the evidence, beyond a reasonable doubt, that the defendant actually believed in good faith that the check was genuine; that the leases were worth $10,000; and that the Mudge Oil Company had authorized Howard to take back in cash the $15,000, or that Howard would account to the Mudge Oil Company for same, then the defendant had no intention to defraud and it will be your duty to return a verdict of not guilty.

Subsequently, he amended the last paragraph of this portion of his charge to begin as follows:

> If you find from the evidence, or if you entertain a reasonable doubt thereof, that the defendant actually believed in good faith that the check was genuine * * * (R. 319).

Petitioner attacks the instruction on intent (Pet. 4, 5–6, 14, 15–18) as failing to charge that the presumption that a person intends the natural and probable consequences of his act is rebuttable. However, the judge in substance so stated when he charged that the presumption was applicable "unless the testimony satisfies you of something else." Furthermore, he related his general charge on intent to the facts of the case by stating that petitioner was not guilty if he believed in good faith that the check was genuine and that the leases were worth the price for which they had been sold. It is thus clear, as the court below

held (R. 498–499), that the district judge properly instructed the jury on the issue of intent.

3. The judge also instructed the jury that a defendant is presumed to be innocent until proved guilty beyond a reasonable doubt, and he defined reasonable doubt (R. 312–313). He then stated that the presumption was not intended to shield from just punishment one who was actually guilty (R. 313). Petitioner excepted to this portion of the charge (R. 318), and now urges that it constituted reversible error (Pet. 5, 6, 14, 15–16, 18).

He relies on *Gomila* v. *United States,* 146 F. 2d 372, in which the Circuit Court of Appeals for the Fifth Circuit reversed a conviction in a case which it considered doubtful on the evidence because of an accumulation of errors, including a charge similar to the one given here. That the court did not consider the mere giving of such an instruction a ground for reversal is shown by its refusal to reverse the conviction in another case in which the same statement was made in an instruction. *Pasqua* v. *United States,* 146 F. 2d 522 (C. C. A. 5), certiorari denied, 325 U. S. 855 (see the Government's brief in opposition in that case, No. 1047, October Term 1944, pp. 9–13). It is doubtful that the criticism of the charge in the *Gomila* case is sound. In essence, it is not very different from the charge approved by this Court in *Allen* v. *United States,* 164 U. S. 492, 500, a capital case. See also *Boehm* v. *United*

States, 123 F. 2d 791, 811 (C. C. A. 8), certiorari denied, 315 U. S. 800. A similar instruction has recently been urged as error before this Court in two cases in which certiorari was denied. *Pasqua* v. *United States, supra; United States* v. *Carruthers,* 152 F. 2d 512 (C. C. A. 7), certiorari denied, No. 763, this Term, March 11, 1946.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question requiring review for other reasons. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

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